IN THE
SUPREME COURT OF MISSOURI

No. SC84617

SHELTER MUTUAL INSURANCE COMPANY,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE WILLARD C. REINE, COMMISSIONER

APPELLANT'S REPLY BRIEF

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ARGUMENT

I.

Shelter contends that its cafeteria sales are exempt from tax because it, and not some third party, operated the cafeteria and because its cafeteria was located in a building owned by it and to which it restricted access only to employees and authorized visitors. Although the cafeterias at issue in *J.B. Vending v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), were located in buildings in which access was restricted to employees and authorized visitors, Shelter fails to explain why its cafeteria customers were not a segment of the public while the cafeteria customers in *J.B. Vending* were.

One might expect that Shelter, as the party who initiated this case by seeking a refund of the tax it had collected from its customers, would explain why its cafeteria sales should be distinguished from the cafeteria sales held taxable in *J.B. Vending*. But Shelter instead simply attacks the Director's contention that this case is not legally distinguishable from *J.B. Vending*. Shelter asserts that the Director's position is that the patrons of every dining facility, including private ones, are a subset of the public. Resp.'s Brief, p. 13. This is a misrepresentation of the Director's argument. The Director simply contends that a cafeteria still regularly serves the public even if the cafeteria operator itself imposes restrictions that effectively limit access to that cafeteria to only a segment of the public. Shelter's argument that the Director wishes to tax "private" cafeterias is circular and simply avoids the issue. As we know from *J.B. Vending*, the issue is whether Shelter's cafeteria serves a segment or subset of the public. To simply assert that a

cafeteria is "private" does nothing to answer that question.

Shelter attempts to distinguish its situation from that in *J.B. Vending* by arguing that the food service company that operated the cafeterias in *J.B. Vending* offered its services to anyone. But this Court never held that this fact alone was dispositive. Nothing in *J.B. Vending* suggests that the result would have been different if the food service company had owned the building in which the cafeteria was located or if the building owner itself had operated the cafeteria. In fact, the Court suggested that that the legislature did not intend that a business serving meals and drinks could create some access-limiting criterion and then argue that it was not open to the public." *Id.* at 189. This statement shows that the Court was not limiting its decision to only situations in which a third party has either directly or indirectly restricted access to the cafeteria or restaurant.

Shelter fails to explain why a cafeteria or restaurant located in a restricted-access building is not deemed to serve a segment of the public simply because the cafeteria operator and building owner are one in the same. This contention is seemingly at odds with the result in *J.B. Vending* because the building owners in that case actually "owned" the property in which the cafeterias were permitted to operate and the building owners provided some of the equipment used in the cafeteria operation. *Id.* at 184 ("In operating these food service facilities, J.B. *largely* employed its own food service equipment . . . .").

Shelter contends that it does not sell to everyone and that the Director's position

reduces the phrase "regularly serve the public" to mere surplusage. But this complaint is nothing more than Shelter's refusal to accept the holding in *J.B. Vending* that the word "public does not necessarily mean all the people all the time.

Shelter also argues that it refused to sell to everyone, but this is not entirely correct. Although Shelter restricted access to its building to only employees and authorized visitors, it apparently served anyone that gained access to its cafeteria. All cafeteria patrons, including visitors, paid for their own meals (L.F. 10).

Shelter claims that the Director's position here is inconsistent with the position she took in *J.B. Vending*. Relying on the Director's brief in that case, Shelter argues that the Director determined that the cafeteria sales in *J.B. Vending* were taxable because the cafeteria was operated by a third-party vendor and not the building owner or employer. But Shelter ignores the fact that the taxpayer in *J.B. Vending* (who, incidentally, was represented by the same attorneys who represent Shelter in this case) made a similar claim. The Director repudiated this claim in its *J.B. Vending* reply brief:

> J.B. speculates that the Director's position here is that employee-cafeteria sales are taxable only if the employer hires a third party to operate the cafeteria, but that these sales are not taxable if the employer operates the cafeteria itself. . . . J.B.'s assumption is incorrect. The Director has not made such an argument in this case and would have no reason to do so based on the record before this Court. This case involves only the operation of cafeterias by a third party, not the operation of cafeterias by the employer itself.

(Appendix, p. A1-A3). Moreover, Shelter's claim in this regard is basically irrelevant because, as the Director mentions in her opening brief, this Court did not base its holding in *J.B. Vending* solely on the fact that a food-service company operated the cafeterias.

Shelter also contends that the Director's position here is inconsistent with two rules promulgated by the Department of Revenue ten and twenty years ago. Shelter contends that these rules show that the Director has taken a policy position that a place can be considered not regularly serving the public if it sells to only a segment of the public. Whether this is, in fact, true is entirely irrelevant because in *J.B. Vending* this Court held that a place can be considered as regularly serving the public even if it sells to only to a segment of the public. Beyond that, however, the rules that Shelter relies on do not support its argument.

First, Shelter contends that 12 CSR 10-3.048(7) recognizes that a country club is not a place that regularly serves the public. Ignoring the fact that the relationship between Shelter and its employees is quite different than a country club's relationship with its own members, the language of the rule does not explicitly state that a country club never regularly serves the public, it simply provides the club with an option for paying sales tax on meal and drink sales to its members and their guests:

> If a club regularly serves food and beverages to the public, all sales are subject to sales tax on the amount of gross receipts. If a club does not regularly serve food and beverages to the public, other than its members and their guests, and the club acts as a cooperative association for the benefit of its members, the club has the

option of either collecting and remitting sales tax on its sales to members and guests or paying sales tax on the club's purchases of food and beverages.

In fact, the rule could be read as suggesting that a club regularly serves the public even when it sells to members and guests, except that the club may either collect sales tax on its sales or it may pay tax on its purchases.

Shelter's citation to this rule as evidence of the Director's current policy position is curious considering that this Court expressly stated in both *Greenbriar I* and *Greenbriar III* that the Director has repudiated or disavowed this rule. *See Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 37 n.1 (Mo. banc 1996) (*Greenbriar I*); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 355 (Mo. banc 2001) (*Greenbriar III*). In fact, this Court's opinion in *J.B. Vending* and the dissenting opinion in *Greenbriar III* suggest that such a policy position, if in fact it existed, would be contrary to the sales tax law. *See J.B. Vending*, 54 S.W.3d at 186 ("To the extent that the Commission interpreted *Greenbriar* or *Westwood* to hold that sales to any restricted segment or subset of society do not constitute sales to the public, it was incorrect."); *Greenbriar III*, 47 S.W.3d at 361-62 ("I believe the Court should revisit and overrule its decision in *Greenbriar Hills I* and its progeny, *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), which I wrote and followed the error of *Greenbriar Hills I*–an error that should not be perpetuated."). Moreover, the dissent in *Greenbriar III* suggested that a country club regularly serves the public and that its sales are taxable even when the club sells to its own members:

> There is no question that the country club sale are sales at retail. But are such sales to the public? But just because the country club is open only to its own members, and presumably to their nonmember guests, does that exclude such members and guests as members of the public? Where, after all, does a country club get its members except from the public?

Greenbriar III, 47 S.W.3d at 360.

Shelter's reliance on 12 CSR 10-3.404 is equally unavailing. This rule exempts from tax sales of meals made to students at tax-exempt schools or to students at schools operated by charitable institutions or colleges and universities:

> Tax exempt schools, charitable institutions, colleges and universities operating lunch rooms, cafeterias, dining rooms or any other facilities where meals are provided to students are not in the business of selling regularly to the public and are not subject to the sales tax. This exemption does not apply to food, drink and snacks sold at student unions and the like, where the items are equally available to and sold to the public.

12 CSR 10-3.404(1). This rule does not assist Shelter because the sales tax law expressly exempts from tax all sales made by or to religious and charitable organizations and public elementary and secondary schools. Section 144.030.2(19), RSMo 2000. Although Shelter likens itself to a dormitory cafeteria, common sense dictates that the relationship between Shelter and its employees and visitors is substantially different than the relationship between a college or university and its students. Moreover, Shelter leaps to

the unsupportable and highly speculative conclusion that it operates its cafeteria in precisely the same manner as colleges and universities operate their dormitory cafeterias. Of course, nothing in the record even remotely suggests that this is true. In fact, common experience might suggest that it is not.

Finally, Shelter alludes to the fact that the AHC suggested that Shelter's sales were not taxable because it did not benefit from its cafeteria sales. Shelter also claims that it operates its cafeteria solely for its employees' benefit rather than its own pecuniary gain because the cafeteria is operated at a loss (Respondent's Brief, pp. 17-18). To the extent that Shelter is arguing that its sales are not taxable because it is not engaged in a "business" as that term is defined under § 144.010.1(2), RSMo 2000, Shelter has waived that issue since it was not presented to either the Director or the AHC as a basis for a refund (L.F. 1-5). *See Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995). Thus, the AHC's comment that it was "questionable whether Shelter operates the cafeteria with the object of gain, benefit or advantage" was irrelevant to the issue it had to decide (L.F. 14).

The reason for the rule requiring all grounds for a refund to be presented to the Director is obvious. The parties litigated this case under the impression that the only issue was whether Shelter's cafeteria was a place that regularly served the public. The parties entered into a stipulation of facts with this issue in mind. If Shelter had properly raised the issue of whether it was engaged in a business under the sales tax law, one can reasonably assume that either the stipulation would have included additional facts bearing

on that issue or that the parties would have presented evidence on that issue before the AHC. Shelter should be permitted to address an issue not raised in the pleadings and which is accompanied by a potentially incomplete record. In addition, this Court's ability to give an informed construction of the law is made more difficult by this haphazard approach.

Even if this issue had been properly raised, it does not assist Shelter's claim. Under the sales tax law, a business "includes any activity engaged in by any person, or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect." Section 144.010.1(2). The AHC found that Shelter charged more for meals and drinks than it had paid for the food and drink it later sold in its cafeteria (L.F. 14 n.5). This constitutes a direct gain or benefit.

Shelter, however, argues that its cafeteria charges do not cover its costs. Even if this is true, the record, incomplete though it may be, supports a reasonable inference that Shelter at least indirectly benefitted in that its cafeteria operation likely helped it to retain and recruit employees and increased their productivity by minimizing the time employees spent away from work to eat lunch. Neither the AHC, nor this Court, is obliged to believe Shelter's "self-serving and subjective claims" that it gained no benefit whatsoever from its cafeteria operation. *See Kanakuk-Kanakomo Kamps v. Director of Revenue*, 8 S.W.3d 94, 98 (Mo. banc 1999).

II.

Shelter, relying on this Court's recent decision in *Dyno Nobel, Inc. v. Director of Revenue*, 75 S.W.3d 240 (Mo. banc 2002), argues that its refund claim cannot be offset by the amount of sales tax it avoided by issuing resale certificates to the sellers who sold it food and drink Shelter later resold in its cafeteria. But Shelter's reliance on *Dyno Nobel* is misplaced.

In that case, the taxpayer had purchased electricity. The seller of that electricity, however, never collected sales tax from the taxpayer, and the taxpayer never provided the seller with any certificate of tax exemption. Instead, the taxpayer paid use tax directly to the Director of Revenue. Later, the taxpayer sought a refund arguing that it did not owe use tax on the electricity purchases. The Director acknowledged that the taxpayer did not owe use tax on the purchases, but argued that the taxpayer owed sales tax on those same purchases. The AHC agreed and denied the taxpayer's request for a refund and instead credited the refund amount toward the unpaid sales tax. This Court reversed the AHC's decision because the Director had not made a sales tax assessment and, more importantly, because the seller of the electricity, not the taxpayer, was obligated to remit the tax to the Director.

Unlike the taxpayer in *Dyna Nobel*, Shelter issued resale certificates indicating to its sellers that Shelter's purchases were exempt from tax. Under the sales tax law, Shelter is itself liable for the tax it failed to pay because it claimed an improper exemption. *See* § 144.210.1, RSMo 2000. No law imposed liability on the taxpayer in *Dyna Nobel* for

the sales tax that the seller failed to collect.

Shelter complains that allowing offsets could lead to the Director seeking offsets for taxes that are unrelated to the transaction for which the refund is sought. The Director, of course, is taking no such position in this case. The Director is seeking an offset only for taxes owed on Shelter's purchases of food and drink that are directly related to its refund claim for taxes it collected on meals that it prepared using the same food and drink.

Finally, Shelter complains that the Director is seeking to offset taxes that are outside the limitation period and that there must be a tax assessment before a refund can be offset by taxes owed. Although it is not part of the record in this case, Shelter informs this Court that the Director did not follow these procedures until after the AHC issued a decision in this case and that a separate assessment is now pending before the AHC. What Shelter neglects to mention is that it has appealed the Director's assessment to the AHC contending that it is invalid because it covers periods beyond the three year statute of limitations. By making this refund claim, Shelter tacitly admits that it owed sales tax on its purchases of food and drink. It should not be allowed to reap a windfall by waiting to claim a refund after the limitations period has run on the taxes it owed and then hide behind the statute of limitations to avoid paying sales tax on its purchases.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Shelter's refund claim, and its decision should be reversed. Alternatively, the AHC erred in refusing to offset Shelter's refund claim by the amount of sales tax that Shelter avoided on its purchases by issuing resale certificates.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 2958 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on November 14, 2002 to:

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